

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION

4 GEORGIA-PACIFIC CONSUMER
5 PRODUCTS, LP; FORT JAMES
6 CORPORATION; and GEORGIA-PACIFIC,
7 LLC,

8 Plaintiffs,

DOCKET NO. 1:11-cv-483

9 vs.

10 NCR CORPORATION; INTERNATIONAL
11 PAPER COMPANY; and WEYERHAEUSER
12 COMPANY,

13 Defendants.

14 /

15 TRANSCRIPT OF MOTION HEARING

16 BEFORE MAGISTRATE JUDGE HUGH W. BRENNEMAN, JR.

17 GRAND RAPIDS, MICHIGAN

18 September 22, 2014

19
20 Court Reporter: Glenda Trexler
21 Official Court Reporter
22 United States District Court
23 685 Federal Building
24 110 Michigan Street, N.W.
25 Grand Rapids, Michigan 49503

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18 P R O C E E D I N G S

19 Grand Rapids, Michigan

20 September 22, 2014

21 2:13 p.m.

22 P R O C E E D I N G S

23 *THE COURT:* Good afternoon, gentlemen. It's a
24 pleasure to see you. This is a motion to compel. I've had an
25 opportunity to read the briefs the parties have submitted.

1 Which includes, of course, NCR's brief in support of its
2 motion, International Paper's brief in opposition. And the
3 Court, of course, appreciates Georgia-Pacific's brief
4 adjudicating the matter. We'll simply adopt that, unless the
5 parties have an objection, and we can all go home.

6 So I suppose we ought to make a record, however, just
7 for purposes of appeal. And NCR may proceed.

8 *MR. MARRIOTT:* Thank you, Your Honor.

9 *THE COURT:* I will ask beforehand, I understand
10 there's going to be a Power Point presentation?

11 *MR. MARRIOTT:* Well, Your Honor, I apologize for the
12 confusion. We have prepared a set of demonstratives which I
13 would like to hand out with the Court's permission. They are
14 Power Point slides. The intent is not to display them, and I
15 think there was some poor communication on our side for which I
16 apologize. We did not -- we do not intend to display them on
17 the screen. And we recognize that inconvenience to the Court
18 and the person who spent 30 minutes preparing it, and so for
19 that I apologize.

20 *THE COURT:* Our IT people did spend some time getting
21 ready based on the notification they received last Friday, I
22 believe.

23 *MR. MARRIOTT:* Yes.

24 *THE COURT:* And it would have been nice to have been
25 told that it wasn't going to be necessary. We have that

1 capacity. Why don't you want to use it?

2 *MR. MARRIOTT:* Well, Your Honor, I have a handout
3 which I thought might be easier. It is exactly what we would
4 display on the screen.

5 *THE COURT:* All right. I will let you present your
6 argument any way you want to.

7 *MR. MARRIOTT:* Again, I apologize, Your Honor, for
8 the miscommunication. It's entirely our fault, and it won't
9 happen again.

10 With your permission I would like to hand out what
11 otherwise might have been displayed on the screen. I hope this
12 will be a little easier to follow.

13 *THE COURT:* If you would like to share a copy with
14 me, I would appreciate it.

15 *MR. MARRIOTT:* Your Honor, we seek, as you know, by
16 way of this motion from having reviewed the papers two things.
17 We would like, respectfully, supplemental answers to
18 interrogatories, and we would like a 30(b)(6) witness.

19 The information that's been requested is, we believe,
20 unquestionably relevant, and none of the arguments that have
21 been submitted by Georgia-Pacific are in our judgment
22 sufficient to justify its refusal to respond.

23 And indeed I believe Georgia-Pacific -- excuse me,
24 with respect to IP, IP's opposition is, I think, quite clear in
25 conceding that they have no objection to the 30(b)(6) witness

1 at this point, so the argument is, I believe, today really
2 about the interrogatories, but I'll touch briefly upon both.

3 Let me just explain, Your Honor, what you have before
4 you. You have before you some demonstratives which I hope will
5 be of some help in explaining the argument. And if I may ask
6 you to turn to page 2, let me explain what this is.

7 This lawsuit concerns, as I believe you know, a site
8 known as the Kalamazoo Superfund site. The site consists of
9 approximately 83 miles of the Kalamazoo River and Portage Creek
10 and certain surrounding areas. The Environmental Protection
11 Agency, the EPA, has divided the site into a number of operable
12 units and work areas. And insofar as it matters to this
13 motion, Your Honor, there are 15 or 14 different mills,
14 recycling mills to be specific, that are located either at the
15 site or upstream of the site. Twelve of those mills are within
16 the boundaries of the site, and two of those mills are outside
17 the boundaries of the site, but Judge Jonker has indicated that
18 they will be part -- potentially at least -- part of the next
19 trial in this case.

20 If I can have you turn to the next page, Your Honor.
21 As this chart shows, the recycling mills located at the site
22 discharged waste into the Kalamazoo River directly, and they
23 did that over a not-insignificant period of time, and not
24 shockingly those discharges contaminated both the river and the
25 surrounding areas and are very much at the core and heart of

1 what this case is about.

2 Now, Georgia-Pacific operated, Your Honor, a number
3 of the mills located at the site or it's a successor to those
4 who did, and it was determined relatively early on that
5 Georgia-Pacific was at least a potentially responsible party
6 for cleaning up the site. And it has in fact been involved in
7 several litigations about that very subject.

8 Georgia-Pacific commenced the present case in an
9 effort effectively to shift at least partially responsibility
10 for the cleanup of the site onto the defendants in the case,
11 and that includes International Paper, it includes NCR, and it
12 includes Weyerhaeuser.

13 Importantly, though, for purposes of why we've served
14 the discovery requests we NCR have served, Your Honor, is that
15 NCR does not own, did not ever own a mill recycling paper on
16 the Kalamazoo River. NCR did not discharge any waste into the
17 Kalamazoo River. NCR didn't make the PCBs that are the subject
18 of the request for cleanup. NCR sold paper, and a coating on
19 portions of that paper included PCBs.

20 We don't believe, Your Honor, for NCR that any of the
21 carbonless copy paper that was recycled at the site derives
22 from transactions for which NCR can be held responsible. But
23 we had a trial, a phase 1 trial in this case, and Judge Jonker
24 determined that at least some of NCR's sales of carbonless copy
25 paper broke or trim could be the subject of liability, and,

1 therefore, NCR remains in the case.

2 If I can refer you to the next page, page 5 of the
3 deck, there are in this phase of the case a number of issues.
4 These issues are important as backdrop to the present requests
5 to compel. Among other things, the issues to be decided here,
6 Your Honor, are apportionment of the alleged harm to the river,
7 equitable allocation of the responsibility among the parties to
8 clean up the river, and the applicability or not of certain
9 defenses: Statute of limitations, estoppel, laches, and
10 unclean hands.

11 And so in order to pursue those defenses, NCR served
12 a set of interrogatories. Those are excerpted at page 6 of
13 this handout. And at the same time we served a 30(b)(6)
14 request on the parties. And essentially the same requests have
15 been served on all the parties. And what those requests seek,
16 among other things, is the parties' understanding and positions
17 and contentions with respect to whether or not carbonless copy
18 paper was recycled at those 14 mills, and if so in what
19 amounts, and when it was recycled. We seek their positions as
20 to what, if any, PCBs were recycled at those mills. We seek
21 their contentions and facts they may possess about the paper
22 products that were produced at the mills, because that gives
23 some indication as to whether or not carbonless copy paper for
24 which NCR could be held responsible was recycled at a given
25 mill. And we seek information about the recycling processes

1 that were used at the mills and the wastewater that was, if
2 any, discharged at those mills. All of those questions go to
3 whether or not at a given mill there was carbonless copy paper
4 recycled for which NCR could be held responsible. So we served
5 those requests.

6 And just to illustrate, Your Honor, why this matters.
7 If I can refer you to page 7. You have a diagram. It may be a
8 little crude, but I hope it will illustrate the point. A key
9 issue here is the extent to which there are PCBs at this site
10 for which NCR can be held responsible. And we intend to show
11 during the phase 2 trial of the case that the mills -- that the
12 mills recycling at the site were not recycling carbonless copy
13 paper for which NCR can be held responsible and that the PCBs
14 at the site and the cleanup of those PCBs at the site are the
15 responsibility of the other parties to the case.

16 To make that showing, Your Honor, we need information
17 about what exactly went on at these mills. We need to know
18 what carbonless copy paper, if any, was recycled at the mills
19 and what the parties' contentions are with respect to those
20 recycling operations. So we need to know, for example, if you
21 look at the top of this chart where you have a little green
22 recycling bin, we need to know what was going into these mills,
23 where that carbonless copy paper, where that wastepaper was
24 coming from. Was it wastepaper for which NCR can be held
25 responsible or was it not? And we need to know once it went

1 into the mills what happened to it, what processes were applied
2 to it. Because that affects whether it went to a landfill, it
3 affects whether the wastewater that was used to recycle the
4 paper went to a treatment plant, and it affects whether it went
5 in some instances directly to the river. Your Honor saw the
6 pictures earlier in the handout that shows water, wastewater
7 going directly to the river, and that happened and happened for
8 some period of time, and the question is did it happen with
9 respect to the recycling of carbonless copy paper for which NCR
10 can be held responsible.

11 So those are some of the reasons, Your Honor. We
12 need to know what it is that happened at these mills so we can
13 make a showing that NCR is not, can't be responsible for the
14 PCBs discharged at a given site.

15 International Paper and the other parties have taken
16 the position that despite NCR's absence from the site, despite
17 the fact that it didn't discharge any PCBs into the site, we
18 are entirely responsible for the cleanup of the PCBs in the
19 river simply because NCR manufactured paper that included at
20 one period of time PCBs and because Judge Jonker found that as
21 of a certain period of time NCR had awareness that there were
22 PCBs in the coating on its paper.

23 *THE COURT:* Has that issue been litigated?

24 *MR. MARRIOTT:* Well, the issue, Your Honor, as to
25 whether or not NCR is potentially responsible has been

1 litigated. It was litigated in phase 1. And we have been
2 identified, as have the other parties, as a potentially
3 responsible party. So for the issues, a set of issues for the
4 second phase of the case is what is the nature and scope of
5 liability? What, if any, apportionment and allocation of
6 responsibility can be made as between and among the parties?
7 So, in other words, who is responsible for what cleanup?

8 *THE COURT:* But nobody has said that you are
9 responsible simply because you manufactured the paper?

10 *MR. MARRIOTT:* Well, we've been found to -- I think
11 that's right, Your Honor. I think what Judge -- I don't speak
12 for Judge Jonker, obviously, but I believe what he intended by
13 his opinion is to say that we are potentially responsible and
14 we're potentially responsible because he found that there were
15 at least some transactions, some sales of carbonless copy paper
16 that were made at a time when Judge Jonker believed NCR had
17 knowledge sufficient to convert those sales from being sales of
18 useful product into disposal of hazardous waste. So there are
19 at least some transactions for which the Court has found that
20 we are potentially responsible.

21 So that led, Your Honor, to the requests that are
22 presently at issue and to the IP responses to those requests.
23 And the response, Your Honor, is effectively four-fold, and
24 we've tried to describe them in a netted-out way on page 8.

25 What essentially International Paper has said is, "We

1 can't give you what you've asked for because we don't know."
2 One. "We can't -- we can't tell you what you've asked for
3 because what you've asked for is privileged, and telling you
4 would reflect the mental impressions and opinions of our
5 lawyers." They then said, "We can't tell you now, but we'll
6 tell you later. You'll know later when you see our expert
7 reports what it is exactly we have to say." And then they
8 said, "Failing that, take a look at the documents and you can
9 find the answers in the documents." And what they basically
10 said is reflected in these five bullet points in the bottom
11 right quadrant of the diagram. They have said, "Look at the
12 documents that either have been produced" -- and this is
13 important, and Georgia-Pacific underscores this in its
14 papers -- "or will be produced."

15 These are documents that were produced not only in
16 the present litigation but also in prior litigations to which
17 NCR and I believe also International Paper were not parties.
18 They have told us that the documents may answer the questions
19 but not necessarily. They have not specified the productions
20 to which we're pointed with any particularity. They
21 effectively comprise about 4 million pages of paper. I don't
22 believe there's been any serious dispute of that. Those
23 answers are, Your Honor, we submit, not sufficient.

24 And let me take, if I may, just a few more minutes of
25 the Court's time and try to walk through each of those four

1 rationales.

2 Again, as I said at the outset, what we're looking
3 for simply is what we consider to be real answers to our
4 questions. We need answers to the questions in order to
5 prepare for trial. We need to know what the allegations are.
6 We need the information for our experts to be able to come up
7 with their opinions. And the information requested is, as I
8 said, unquestionably relevant. No one has told you that the
9 information we have sought isn't relevant. We've simply been
10 presented with these objections.

11 So let's take the first which I've described at
12 page 10 of this handout. The first explanation, the first
13 defense, if you will, or objection is sort of the so-called "We
14 don't know" defense. And effectively what they have said is
15 that we, International Paper, have a very limited role at the
16 site, we're relatively new to the site, and we just don't know
17 the answer to the questions and, therefore, we can't provide
18 the answer to the questions.

19 I think the problem with that, Your Honor, is that a
20 party may not, at least as we understand the rules, simply say
21 they don't know without making some reasonable effort to learn
22 the information that's called for by the interrogatory. And
23 there's no indication on their response to our interrogatories
24 that they have really undertaken that reasonable search.

25 If after undertaking a reasonable search they in fact

1 do not know the answer, then certainly, Your Honor, they are
2 entitled to say that they don't know. But here is the critical
3 problem with what their approach does: What they can do is say
4 they don't know. What they can't do, in our view, is to say
5 they don't know now, undertake to learn later when discovery is
6 closed, and then provide the answer at trial. And that,
7 unfortunately, is precisely what we expect they intend to do.
8 Not know now, have discovery close, which it does in about
9 seven weeks, tell us the answer later at a point in time when
10 we can do nothing about it by way of further discovery, and
11 when we are only left with their expert reports and can only
12 cross-examine expert reports and can't otherwise pursue related
13 discovery, and at a point where we can't develop factually
14 through other discovery our case.

15 What we asked to know is what their contentions are,
16 Your Honor, and certainly they know what their contentions are.

17 This case was originally filed in 2010. There was a
18 not-insignificant period of discovery that preceded the
19 first-phase trial. There was a first-phase trial. There was a
20 first-phase decision. And there has been a year that has
21 elapsed since Judge Jonker entered his first-phase decision and
22 set us off on the course of preparing for a phase 2 trial. So
23 there has been ample time for International Paper to figure out
24 what its contentions are and to be able to tell us what they
25 are. And the "I don't know" defense perhaps has some

1 applicability to some aspects of discovery requests, but it
2 certainly can't, we don't believe, properly be applied to what
3 their contentions are.

4 We asked to know what it is they contend specifically
5 happened at these mills for which we can be held responsible so
6 that we can take further discovery from them, from other
7 parties, and from third parties and prepare our experts to
8 respond to what it is they have to say.

9 Rule 33 expressly contemplates the prospect and the
10 possibility of asking for contention interrogatories. And that
11 is essentially what we're asking: What is it that you contend
12 these mills did? We know you weren't there with respect to all
13 of the mills, but you take a position and you intend to take a
14 position about what happened at these mills and what went on,
15 and that's what we'd like to know now so that we aren't
16 proceeding -- even if -- so that we aren't proceeding into
17 effectively what becomes a trial in an expert phase by ambush
18 when we learn for the first time, again when it's too late,
19 what it is they contend the case is about. And on the
20 particular theory on which they contend we can be held
21 responsible. So that's our response to their first defense of
22 "I don't know."

23 The second, Your Honor, is the so-called "privilege"
24 defense which we briefly describe at page 11. And essentially
25 what here they have said is "We don't know because we don't

1 personally have somebody who worked at these mills," because,
2 after all, these events took place, many of them, more than
3 five decades ago. "We don't know. And so what we do know is
4 reflected not only in documents but in our lawyer's review and
5 assessment of those documents."

6 But the rules, Your Honor, have been long since
7 revised to permit discovery that calls for opinions and
8 contentions and admissions relating not only to facts but the
9 application of facts to law. And in answering contention
10 interrogatories, a party is not only giving factual specifics
11 which the party contends supports a claim, they are giving
12 their contentions. And that is, we believe, an unquestionably
13 permissible area of discovery. For us to know with specifics
14 what exactly it is they contend the facts are or they will take
15 positions as to at trial so that we can prepare our case.

16 And interestingly, International Paper -- and we
17 included this in Exhibit E to our opening motion -- they have
18 effectively asked -- though not quite as many as we asked --
19 they effectively asked the exact same interrogatories of us
20 that we've asked of them. It can't be -- it can't be,
21 Your Honor, for that additional reason that this information,
22 telling someone what your contentions are, what you intend
23 shortly to say in an expert report in any case, are privileged
24 and, therefore, immune from discovery.

25 In a case like this, much of what goes on, much of

1 what will be said relates in some way to expert issues, and if
2 it relates to expert issues where a defense -- we would
3 effectively get no discovery and get nowhere, and that's,
4 unfortunately, the concern we have about where we end up in a
5 world in which they can't and won't tell us anything until
6 later in the case.

7 That brings us to the third defense of
8 International Paper which is the "tell you later" defense. And
9 that defense we think is, for reasons I've already stated, we
10 think simply untenable and unfair, because it puts us in a
11 position of not knowing even what their specific allegations
12 are as to how it is NCR could be responsible at any one of
13 these 14 mills when they won't tell us. When we will have
14 learned it at a point in time when discovery is closed and
15 we're in no position to take follow-up discovery of third
16 parties, of government agencies, we're in no position to find
17 witnesses -- additional witnesses who may have some information
18 to add, because we didn't get the information in time.

19 At this point in the case where, again, there has
20 been one trial, where the case was filed more than four years
21 ago, they ought to be in a position to tell us what their
22 contentions are. And that, again, is what these
23 interrogatories fundamentally are asking. What is it you
24 contend is the wastepaper that went into those mills? How much
25 and when? What is it you contend by way of PCBs went from

1 those mills into that river for which you say NCR can be held
2 responsible?

3 Lastly, Your Honor, the defense offered here is sort
4 of a "look-at-the-production" defense, and that's the
5 Rule 33(d) defense which we describe at page 13. And, of
6 course, Rule 33(d) of the Federal Civil Procedure allows a
7 party in appropriate circumstances to refer to documents by way
8 of answering an interrogatory.

9 Here, however, we think that International Paper's
10 reliance on Rule 33(d) is misguided. The rule permits
11 reference to business records in lieu of a narrative response,
12 but it only does that where the burden of ascertaining the
13 answer is substantially the same for both parties and where the
14 records to which counsel points specifically identify in detail
15 the information that purportedly provides the response.

16 And in this case International Paper points to a
17 large collection of documents. It expressly says in its
18 opposing paper that these documents are not its business
19 records, which by itself takes it out of the rule on which it
20 purports to rely. It points to millions of pages of paper. No
21 specificity provided. And it becomes, frankly, quite clear,
22 Your Honor, from reading their papers that the documents they
23 reference are not even documents that they have thoroughly
24 reviewed and carefully reviewed to find the answers. They say
25 they may provide the answers. They say the answers may be

1 provided in documents yet produced. That response puts an
2 undue burden on NCR to understand what their contentions are,
3 even if the documents answered the questions, and it doesn't
4 appear to us that the documents necessarily answer the
5 questions, but candidly we haven't been through the 4 million
6 pages since they referred us to the documents to be able to say
7 that for certain. But even if that did do it, Your Honor,
8 referring us to documents doesn't tell us what it is they
9 contend happened at each of these mills for which NCR can be
10 held responsible. And it is fundamentally their contentions
11 here that they are trying to keep from us in a way that we
12 think results in prejudice to NCR.

13 We're now in a position where because of a brief
14 extension in the discovery period discovery closes on
15 November 14th. Expert reports are due on November 17th. And
16 what we would ask the Court to do is to require NCR -- to
17 require International Paper to within 14 days answer the
18 interrogatories for which it's now had two months to provide
19 responses since our motion went in, answer the interrogatories,
20 tell us what their contentions are so that we then have what
21 will just be about five weeks to get out additional written
22 discovery if any is appropriate and to pursue as appropriate
23 further discovery before the fact discovery period closes on
24 November 14th.

25 *THE COURT:* Don't your interrogatories go beyond

1 simply asking for contentions, though?

2 **MR. MARRIOTT:** The interrogatories are not expressly
3 styled, Your Honor, as contention interrogatories in the sense
4 they do not say "Please tell us what you contend about X."
5 They are certainly intended as contention interrogatories, and
6 I have personally made clear to all of the parties in this case
7 that what we are seeking -- and I can limit myself for now, I
8 suppose, to International Paper -- what we are seeking is their
9 contentions about what happened at the sites.

10 The interrogatories do not use the word "contention."
11 That is unquestionably true. But that is exactly what they
12 seek. And they don't do that, Your Honor, because in some
13 cases there's more that they can provide than contentions.
14 They can tell us additional information, they can provide
15 additional facts called for by the interrogatories that are
16 more than contentions. But at a minimum we believe we ought to
17 be able to learn what it is their contentions are on these
18 critical topics. Otherwise we go to -- the fact period closes,
19 we get nothing with which we can follow up, and our expert
20 reports go in three days later unsure of even what their
21 contentions are. Promising not only that we will be in a
22 position where we didn't get full and fair discovery as to
23 whatever the contentions are, unless we happen to guess exactly
24 right, which doesn't always happen unfortunately, and we will
25 be in a position where the experts didn't have the benefit of

1 precisely what it is they contend and we have a risk of expert
2 reports simply passing in the night.

3 So we're in a case -- we're left in a situation where
4 we have the other parties all looking to NCR and saying,
5 "Despite the fact that I had mills on the river and despite the
6 fact that I dumped -- or my mills dumped waste into the river,
7 I'm not responsible. You, NCR, are because you made the paper
8 that ultimately got recycled. And you should pay the full
9 bill, but we're not going to tell you exactly what the
10 contentions are about what the mills did until it's too late in
11 time for you to be able to do anything about it. And that
12 fundamentally is our problem.

13 *THE COURT:* I understand your position. And I think
14 you made it very clear. The interrogatories, however, which
15 the Court has to enforce, speak in more detail. And while you
16 may have made it clear subsequently to the other side as to
17 what it is you're looking for, I wonder quite how they are
18 expected to respond.

19 And I'm just picking one of these interrogatories out
20 at random. For example, number 6. "Please identify all
21 evidence that any transaction identified in response to
22 number 4 was an arrangement by NCR for the disposal of
23 hazardous substances." Or number 7, "Please identify by year
24 and by source the PCBs released into the site."

25 Does it require rewording of these interrogatories to

1 get what you want? Otherwise you're looking for some specific
2 amount of particular evidence it would appear.

3 *MR. MARRIOTT:* That's -- I think you chose the more
4 difficult ones for me in this respect, Your Honor. But let me
5 try to answer the question in this way, because I think the
6 answer to these is actually, frankly, much simpler than it
7 might at first appear.

8 What I think would be doable here is for the parties
9 simply to say -- as one party at one point suggested that it
10 would, and we were unable unfortunately to get a stipulation to
11 that effect -- I think it would be sufficient for the parties
12 to say "We have no evidence of transactions that were an
13 arrangement by NCR for the disposal of hazardous waste," for
14 example, "except what was already presented in the first phase
15 of the case."

16 What these interrogatories -- those particular
17 interrogatories are trying to drive at is is there some
18 addition to the case that was made by principally
19 Georgia-Pacific in the first phase of the case that you're
20 going to present anew in the second phase of the case? And if
21 the answer to those particular questions is "We stand on the
22 record such as it was presented in the first phase of the case.
23 The transcript says what it says. Our experts said what they
24 say." If that's what they will say, that we present nothing on
25 this score further than what's there, then I would say fine.

1 That's a clear, clean statement. The transcript says what it
2 says. That tells us what we need to know. Unfortunately, we
3 haven't been able to get that clean statement from them. If
4 there's more than that, then we would like to know exactly what
5 the more than that is.

6 So those two interrogatories, frankly, it seems to
7 me, can be answered by saying "We stand on the record in
8 phase 1 of the case. The documents we presented, the experts
9 we offered." Preferably they would tell us exactly who, but we
10 can figure that out, Your Honor. But what is it, if anything,
11 beyond that? And no one has told me -- and, frankly, I don't
12 think there is anything beyond that -- but just knowing that,
13 knowing that that seals the universe so I now have a target,
14 the target is what was presented in phase 1 and there will be
15 nothing else, that gives me what I believe we need with respect
16 to 6 and 7.

17 *THE COURT:* Number 9 says, "Please identify by type
18 and amount the paper products produced in the . . ." -- is it
19 "furnish"?

20 *MR. MARRIOTT:* It is.

21 *THE COURT:* ". . . used by each mill during each year
22 of the relevant period."

23 Again you're asking for specifics.

24 *MR. MARRIOTT:* We are -- I'm sorry, Your Honor. We
25 are there asking for specifics. And this is one where -- here

1 is another answer to this question that I think ought to make
2 it relatively straightforward for International Paper.
3 International Paper made a motion to require Georgia-Pacific to
4 produce questionnaires -- your Honor heard the motion at
5 length -- to produce questionnaires that contained information
6 about what mills at the site did. If the answer to this
7 question from International Paper is "We have nothing to say
8 about this subject that isn't said in the answer to the
9 questionnaire, we don't take any issue with what's in the
10 questionnaire such that you, NCR, can rely upon the contents of
11 that questionnaire in your expert presentations and we're not
12 going to supplement what's in that questionnaire," then here
13 again I think we have perhaps no problem.

14 The concern is they are going to look at the
15 questionnaire -- I know at least from what one party has said
16 that they are going to take issue with what their own
17 questionnaire said, so relying upon the questionnaire doesn't
18 get us quite where we would want to get. And I don't know in
19 what ways they are going to take issue with the questionnaire
20 or not take issue with the questionnaire. But the answers to
21 those questionnaires provide quite detailed and specific
22 information. It isn't complete. It doesn't necessarily cover
23 every year. If they are going to take a position, for example,
24 that while the questionnaire covers eight years, they think it
25 was the same for all the other years, that's the position I

1 would like to know, because then I can say to my experts, "Look
2 at the table, see what it says in the questionnaire, there's
3 eight rows of data. They have told us that they are going to
4 assume it was the same for the other years. Their position is
5 not that it was any different." Then I've got some actual
6 numbers I can give to my expert, the expert can put them in his
7 model, and I can prepare an expert report. But when all I've
8 got is a collection of documents and no ability to know whether
9 they are going to espouse, reject, supplement, or modify those,
10 it makes it difficult to prepare an expert, it makes it
11 difficult to know what contention to respond to.

12 But that's one where there are specific documents,
13 and if they are able to say "We aren't going to take issue with
14 what's in any of those questionnaires," then my only issue
15 becomes: What are they going to do where the questionnaire
16 doesn't address the question? And it's for that that I'm
17 asking what their contention is.

18 And if you look at some of the other ones,
19 Your Honor -- so, for example, just take 1 and 2. Take 1:
20 "Please identify by mill -- by year and mill the amount of
21 carbonless copy paper recycled at the site during the relevant
22 period."

23 Well, here again, there are questionnaires for some
24 but not all of the 14 mills. We have questionnaires, I think,
25 from seven or eight of the 14 mills. Those questionnaires ask

1 the responding party to identify in the questionnaire whether
2 or not there was carbonless copy paper recycled at a given
3 mill, and if so in what amounts.

4 If the answer is "The best information we have is in
5 the questionnaire, we endorse, we adopt the questionnaire, the
6 questionnaire is admissible into evidence, you can rely upon
7 it," then I know what their position is and I can proceed with
8 that.

9 Where there are holes in the questionnaire, what we
10 ask is to be told what their position is as to what the holes
11 are. Are they going to say that if the questionnaire says that
12 there was no carbonless copy paper, are they today going to say
13 in fact they were wrong about that, there is carbonless copy
14 paper?

15 And at least one party has suggested to us that's
16 what they are going to do. They are going to look at the
17 questionnaire, they are going to say, "Well, it might say that,
18 but that's wrong and that was not fully informed at the time."
19 And that's where the problem arises. I can't simply look at
20 the documents when they are going to tell me when I can't do
21 anything about it that the questionnaire really isn't right
22 after all, that they have now got better information and it's
23 not true.

24 *THE COURT:* It sounds like you have reworked these
25 questions somewhat.

1 MR. MARRIOTT: Well, I wouldn't say, I guess, I've
2 reworked them. What I have done is I've discussed them at
3 length with the parties, and I have some sense of what it is I
4 think they are going to say about them and what it is I
5 think they -- that I believe they can do about them.

6 And, you know, if you want to read into these,
7 "Please identify" -- "Please identify what do you contend was
8 the carbonless copy paper recycled at the mill during the
9 period?" that effectively gets me the same thing. And to the
10 extent that the concern is these seem too absolute and you're
11 asking someone in some absolute sense what the answer is, I
12 recognize it's been 50 years. We weren't at the site. Others
13 of us weren't at the site. But we're all in a position now
14 where we're proceeding to a trial at which despite the fact
15 that nobody was at the site, people mostly through their
16 experts are going to be taking positions about what happened at
17 the site.

18 THE COURT: Were you able when you were talking to
19 the other parties, the other side, to agree upon what any of
20 these interrogatories now mean and how they can be resolved, or
21 do we still have issues with all of them? I think there were
22 two of them you said you weren't pursuing anymore. I can't
23 recall which two those were.

24 MR. MARRIOTT: Well, 13 and 14 we did not move
25 against.

1 *THE COURT:* Right, 13 and 14. How about any others?

2 *MR. MARRIOTT:* I think the fairest way to say it,
3 Your Honor, is that we had discussions with
4 International Paper, we talked about potential compromises. We
5 were unable to bridge the gap.

6 *THE COURT:* The Court, of course, encourages the
7 parties to try to resolve these things short of coming into
8 court. But when you come into the court, I can only look at
9 what the parties actually have submitted, what the actual
10 question is, and does it fly or not, are the answers responsive
11 or not and so forth. Not so much what was intended but what
12 was submitted by both sides. So if the question has evolved
13 somehow to something other than what it says on paper, that's
14 nice, but I don't sit here and try to adjudicate those matters,
15 because that's just not practical. I have to look at what's on
16 the documents the parties have submitted to the Court under the
17 rule.

18 All right.

19 *MR. MARRIOTT:* If I may just briefly, what I would
20 say to that, Your Honor, is I don't -- I think the questions --
21 we stand by the questions as we propounded them. We genuinely
22 believe that we are entitled to know by way of discovery
23 response what it is that each of these mills did during the
24 relevant period of time.

25 My point about contentions is if their answer is that

1 "We can't tell you that" -- they may well -- in fact, I think
2 in some cases they absolutely know the answers to these
3 questions. They submitted some of these parties questionnaires
4 which effectively under oath to the EPA answer the questions.
5 I think they can in some cases answer these questions as they
6 are written.

7 All I'm saying is if there are instances in which
8 they can't because they say "We don't know," at a minimum what
9 we contend is we ought to be able to know what it is you're
10 going to contend about it at trial. Because it's one thing to
11 say "We don't know today, no one has personal knowledge,"
12 that's probably true of much of what's at issue in this case,
13 because of when the underlying events took place. The period
14 of interest here for when PCBs were in carbonless copy paper
15 begins in effectively 1954 and it ends in 1971. So my point
16 really is that there's going to be a limited universe of people
17 who have personal knowledge in any traditional sense, so to the
18 extent these are framed this way, so to the extent there are,
19 there are such people, we get that. To the extent there aren't
20 such people, the lesser -- the lesser quality but still very
21 valuable piece of information that we would like is for them to
22 say "We don't have anyone with personal knowledge, but we
23 contend as follows." And that's why I would say the
24 interrogatories I don't think have evolved, it's just that what
25 they are able to do, what the parties are able to do varies by

1 party, it varies by mill. And if we can't have a kind of
2 absolute answer to this is what this mill did because we owned
3 it or we are responsible for it, what we'd like to know is what
4 they are going to contend about it so we can properly prepare.

5 *THE COURT:* I think you have a good argument there.
6 I think you're entitled probably to know what their contention
7 is. And that makes sense. And I think that would be
8 supportable.

9 Whether these interrogatories -- well, okay. Why the
10 parties can't agree on that much, I don't know.

11 *MR. MARRIOTT:* Unless you have anything further from
12 me, Your Honor, I'll sit. Thank you.

13 *THE COURT:* No. Thank you.

14 *MR. PARKER:* May I, Your Honor?

15 *THE COURT:* I appreciate this book too. I've often
16 made the point and people say, "Well, any suggestions how we
17 ought to present cases in court?" I think I've said you can't
18 dumb things down enough for a Court. I think you've tried
19 here.

20 *MR. MARRIOTT:* I'm just sorry I botched the screen,
21 Your Honor.

22 *THE COURT:* It's fine as far as I'm concerned.

23 *MR. PARKER:* Good afternoon, Judge, John Parker from
24 Baker & Hostetler on behalf of International Paper. If you're
25 looking for dumb, I'm your man.

1 *THE COURT:* No, I just want the old yellow book, the
2 idiot's guide to motions. This is great.

3 *MR. PARKER:* Judge, my cocounsel, David Centner, has
4 a 4:00 hearing in front of Judge Jonker, so I trust we'll be
5 done before then, but if not, he's going to excuse himself a
6 few minutes early.

7 What NCR is really asking for here, Judge, is what do
8 you contend your experts are going to say when they are done
9 with their analysis? And we don't yet know what they are going
10 to say, and that's the problem with us trying to respond to
11 these interrogatories. And we've repeatedly told NCR that.

12 *THE COURT:* Wait a minute. I know you're going to
13 posture as to what do you contend your experts are going to
14 say, but your experts just speak for the company, for the
15 party. It's what the company says. It's what the company
16 contends. The experts are just the mouthpiece for the company,
17 aren't they?

18 *MR. PARKER:* If I can, Judge, what I hope to explain
19 to you, and it's going to take me a couple of minutes, is to
20 show you why the company doesn't know this information. These
21 are really questions that are going to be directed at experts.
22 Because of the long time that has passed, they are going to
23 have to make lots of assumptions. And let me see if I can try
24 to explain that.

25 *THE COURT:* But ultimately doesn't it come down to

1 what the company's position is?

2 MR. PARKER: Sure.

3 THE COURT: Whether it's informed by the experts or
4 it's informed by somebody else.

5 MR. PARKER: Fair enough. Fair enough. I don't
6 disagree with that. But until the experts inform the company,
7 I can't answer the questions. Because they are the ones who
8 are really, as I'll explain in a moment, going to be giving us
9 the answers to these questions.

10 You know, the truth of the matter is, while
11 International Paper and its experts are going through all of
12 the documents that have been produced in this case, we don't
13 have any more familiarity with those documents than does NCR.

14 International Paper never operated a mill on this --
15 on the Kalamazoo River. We were never a party to any of the
16 prior litigation from which documents that have been produced
17 in this case were generated. And in fact, unlike NCR, we
18 weren't a big party in the Fox River, the companion case that's
19 going on in Wisconsin to this case. So in truth we have the
20 least knowledge, the least background on PCBs and what's in the
21 Kalamazoo River of anyone here.

22 And this is now my third time in front of you, Judge.
23 I went through all of phase 1 in this trial without getting to
24 meet you personally. Now I feel like a regular customer. For
25 that I guess I apologize. And so I know you're becoming a

1 little bit familiar with the facts of the case. But let me
2 just give you what I think are the important facts for this
3 motion.

4 In the 1950s, and even beginning before it, NCR
5 developed carbonless copy paper or CCP as we refer to it. And
6 CCP, unbeknownst by all the mills that would subsequently
7 recycle it, contained PCBs.

8 Now, all of these 14 mills on the Kalamazoo River,
9 none of them made CCP. But unfortunately they used scrap CCP
10 called broke and trim from the mills that were making the CCP
11 on behalf of NCR. And the mills on the river recycled that to
12 make other papers: Book paper, writing paper, boxboard,
13 cardboard. And unfortunately when they made those other kinds
14 of paper, that process released a certain amount of PCBs into
15 the river.

16 Now, as I mentioned, International Paper never owned
17 a paper mill on the Kalamazoo River. Rather, St. Regis,
18 another company, owned a company or a mill called the
19 Bryant Mill on the river. It owned the Bryant Mill from 1949
20 until 1966. But it only operated that mill up until 1956.

21 And Judge Jonker found in phase 1 that prior to 1956
22 the Bryant Mill didn't recycle CCP and, therefore, didn't
23 discharge PCBs.

24 The mill was leased -- the Bryant Mill was leased to
25 a company called Allied Paper Company in 1956, and Allied

1 operated the mill until 1966 at which point it bought it from
2 St. Regis. So St. Regis is the nexus to this case. And its
3 ownership -- not its operation but its ownership -- from 1956
4 to '66.

5 And International Paper is a party in this case
6 because in 1990 St. Regis, which had sold the Bryant Mill
7 14 years before, was bought by a company called Champion.
8 Ten years later International Paper buys Champion. So we're a
9 third cousin twice removed from any of these mills that are on
10 the river. And as a result, International Paper doesn't have
11 operational records for any of these mills. We never owned
12 them; we never operated them. Everything that
13 International Paper has in this case is a result of discovery
14 that was done in earlier cases about the river, whether it was
15 insurance litigation or other things like that. So there's no
16 records of our own we can dig into and say "This is the
17 information, NCR, that you are looking for."

18 Now, in its motion NCR breaks down its discovery into
19 five categories, and those are useful for me in trying to
20 explain to you why it is we just can't answer these requests
21 like NCR would like us to.

22 The first category they indicate in their motion is
23 the source and amount of CCP that was recycled at the 14
24 different mills on the river.

25 The second category they identified was the source

1 and amount of PCBs released from the 14 mills or, by the way,
2 from any other industrial plant on the mill.

3 The third category is NCR's involvement with and
4 responsibility for PCBs released at the site.

5 And the fourth category is the operational
6 characteristics of the 14 mills that would impact potentially
7 their release of PCBs.

8 And then the fifth category, which they are not
9 moving for on their motion, where the remediation activities
10 were taken at the site, whether the past or the present.

11 Now, groups 1, 2, and 4 -- the source and amount of
12 CCP, the source and amount of PCBs, and the operational
13 characteristics of the mills and how that would affect the
14 discharge of PCBs -- can really all be kind of lumped together.
15 And we don't know the answer to those questions, but we're
16 working on it.

17 Determining the amount of PCBs that are released from
18 each of the mills, which is really what this all comes down to,
19 is complicated and time-consuming, and our experts are working
20 on it. And as a result what they are really asking for in
21 those three categories is "Tell us what are your experts'
22 opinions." And we can't do that yet.

23 But I want to make clear to the Court, the
24 information they are asking for, Judge, it's not in a business
25 record somewhere. It's not sitting in some record among the

1 millions that have been produced in this case. But by the way,
2 if it was, NCR would be in just as good a position as we are to
3 find this.

4 You know, they were critical of us in their motion --
5 and Mr. Marriott mentioned it again on his argument -- that you
6 just can't say to a party, "Well, here is a bunch of business
7 records. Go find something." And they cite a few cases for
8 that as well. But all of those cases are distinguishable from
9 this situation in this regard: They all involved a party who
10 took their own records, gave them to the other side, and said,
11 "Here, you search through those records and find this
12 information."

13 These aren't our records. We're in no better
14 position than is NCR to ferret through those records that
15 relate to other parties and other mills than they are. And
16 because we never owned a mill, they aren't ours. They can find
17 the information as easily as we can.

18 Second, those cases that are relied upon by --

19 *THE COURT:* You have no independent knowledge.

20 *MR. PARKER:* Right.

21 *THE COURT:* Your whole case is relying upon these
22 records, so that's why these records have any relevance to the
23 answers to the interrogatories that you have to answer, and you
24 don't know anything about what's in the records?

25 *MR. PARKER:* Well, we know something about what's in

1 the records. But my final point on that score is, the other
2 way those cases are distinguishable, Judge, is that they all
3 dealt with a record that actually specifically answered the
4 question. And one of the cases they cite was "What was the
5 cost of our steel?" And the other party said, "Well, that's in
6 here somewhere." Well, they could have pointed them to the
7 records that show the cost of the steel.

8 But here -- and I'm no expert, just ask my wife --
9 the experts are looking at the records and making value
10 judgments about them and they are trying to understand.

11 For example, one of the opinions -- one of the things
12 they have asked us for is, you know, What kind of furnish, what
13 went into these mills? And furnish is the raw material. It's
14 the feed stock that the mills used.

15 So our experts have to first determine for each of
16 these 14 mills for each of the years that they operated, what
17 was the furnish, the front-end product that went in? Well, was
18 it CCP? Was it virgin pulp? You know, the puffed-up wood that
19 you can make paper from. Was it some other form of recycled
20 paper?

21 Now, few, if any, of these mills have records that
22 show that. It's 50 years ago. They simply don't have them.
23 Now, there are the mediation questionnaires that Mr. Marriott
24 referred to, and he certainly is aware of those as much as we
25 are. But by the way, as we explained to you when we first came

1 in on that motion a few months ago, those were prepared for
2 mediation. There may be a tad bit of advocacy in those. But
3 our experts are going to look at those. Our experts are going
4 to also look at other documents outside of what has the
5 operational records of -- it's unfair to call them mediation
6 questionnaires. Operational records. Lawyers prepared those
7 from records way back when that have since been lost or
8 destroyed. But they will look at those.

9 They will also look at sources of industry data that
10 shows what were mills generally using during that period. And
11 in fact we identified two of those reports to NCR, the Lockwood
12 and Post directories that talk about what were mills using back
13 in those days. There's another report that everybody is aware
14 of, this Franklin report. So our experts have to -- and this
15 is true for all the parties -- have to divine based upon not
16 just records that exist but also they will have to render an
17 opinion that, okay, this mill was operating in 1957, it was
18 making primarily this kind of paper, therefore, it is our
19 opinion that of the amount of paper that they were -- or the
20 furnish they were using, 30 percent would have been pulp,
21 30 percent would have been this kind of recycled paper,
22 10 percent would have been that kind of recycled paper. They
23 don't have an answer, but they are going to render an opinion
24 as to what they think it was likely that mill did. So it's
25 impossible until they finish that analysis for us to answer

1 that question. Particularly as to all 14 mills for all
2 14 years, none of which we operated.

3 *THE COURT:* Why did we follow the normal course of
4 pretrial preparation where we did fact discovery followed --
5 and then closed it followed by expert discovery? Why didn't we
6 have, after some obvious fact discovery, why didn't we have
7 expert discovery followed by some fact discovery or fact --
8 further factual discovery based on what the experts have said?
9 So -- in other words, so the parties could follow up on the
10 respective contentions of the parties who apparently have no
11 idea what their case is until the experts tell them.

12 *MR. PARKER:* I can't answer -- I mean, I don't
13 believe any of the parties specifically asked Judge Jonker to
14 set it up that way. But I really -- this happened in phase 1
15 as well. The majority of the folks who testified in phase 1
16 were experts, and we had a fact discovery and then we had
17 expert discovery. And the parties are going to be going after
18 the opinions of the experts.

19 The facts that they have to rely on are so limited
20 given the long passage of time and the derth of records that
21 exist here, that -- you know, it didn't stop any of the parties
22 from putting on good cases. I apparently didn't put on a quite
23 good enough one because I'm still here. But I think -- I don't
24 think that's going to prove problematic, Judge, because there
25 simply aren't enough records out there that my expert is going

1 to, you know, reach into a stack of 4 million, pull out a
2 record and say, "Aha, this is the one that shows that the
3 Bryant Mill recycled less CCP than everybody thought."

4 And it doesn't stop there, by the way. It doesn't --
5 that's just the input. You know, trying to figure out then how
6 much CCP or PCBs then came out of the mill, it would be like if
7 I said, Judge, I want you to -- I want to tell 14 different
8 automobiles how much carbon monoxide did they discharge over a
9 20-year period? Well, it depends on the kind of automobile.
10 It depends on whether it was gas or diesel. It depends on how
11 it was driven. What kind of engine does it have? All sorts of
12 conditions. And that's exactly the same thing that's going on
13 with these mills. And our experts have to again go back and --
14 "divine" is perhaps a strong word -- but they are going to
15 render an opinion of what was the amount of CCPs that were
16 discharged based upon a bunch of factors. The type of mill.
17 Was it boxboard mill? Was it a fine-paper mill? Did it have
18 deinking capabilities or did it not? What was its capacity?

19 *THE COURT:* You normally have an idea of what the
20 experts rely upon before we hear their reports. In other
21 words, everybody has an idea of what the universe of facts are
22 and then the experts go to work on those facts.

23 Here we have 4 million pages of documents and nobody
24 knows what's in there, and then the experts go through that and
25 they come out and they tell you what's in there and they give

1 you their opinions. And presumably, I guess, you would depose
2 the experts and you would look at their reports and you find
3 out what portions of those 4 million pages are particularly
4 relevant to this case that everybody is relying upon and you
5 say, Oh, I see now why you're contending that so and so had X
6 amount of CCPs or PCBs discharged and so forth. But now that I
7 know that, I've got to meet that. I've got to go into those
8 records further. The expert went into those particular records
9 of a particular year, a particular file, particular area, and
10 I've got to go in there and dig out something that refutes that
11 or makes that clear, so I need further discovery.

12 I mean, it seems to me that we've got the cart before
13 the horse because of the rather unusual circumstance that we
14 don't know what the facts are until the experts tell us, based
15 on what you're telling me.

16 *MR. PARKER:* Well -- and by the way, while I'm sure
17 my experts will be testifying about facts, I think mostly they
18 are going to be opinions. They are going to say "Based upon
19 what facts we've been able to glean." Mr. Marriott gave --

20 *THE COURT:* All the more reason, though, isn't it, to
21 find out where they draw their opinions from? So the other
22 side is going to want to go in and say, "Well, where did you
23 get" -- whatever little knowledge you have to base your opinion
24 on, where did you go to in this record to get that little bit
25 of knowledge?" And then they are going to want to go into

1 those formally in the documents and find something that
2 contradicts that or explains it more fully. So we have
3 followup -- unless somebody wants to memorize and master all
4 4 million documents so they can at a moment's notice pull up
5 the key document when they are cross-examining that expert.

6 *MR. PARKER:* Well, fair enough, Judge. And let me
7 see if I can illustrate your point with an example.

8 In Mr. Marriott's nice "Why does it matter?" picture,
9 he shows that one of the things -- the waste comes out of the
10 mill and it goes to a landfill, it goes to a treatment plant,
11 it goes to the Kalamazoo River. The treatment plant is a
12 little bit glorified here. They were what they called
13 clarifiers, big settling tanks that were used. But many of the
14 mills -- well, I think most of the mills -- I can't speak
15 definitively for all 14 -- but many of them hooked into the
16 city sewer system at some juncture. That's a very important
17 fact for the expert, because the amount of discharge before it
18 hooked into the sewer system would be much higher than after.

19 If they want to ask us in an interrogatory "When does
20 your expert contend each mill hooked into the sewer system?" we
21 could answer that. But what the expert has got to divine, to
22 use that word again, is once it hooked into the sewer system,
23 what impact did that have on the amount of PCBs? Yes, it
24 reduced them, but how much? How efficient were all of the
25 other systems within the mill if it had a save-all system? How

1 well did your clarifier work? When you discharged it to your
2 landfill, was your landfill next to the river such that it was
3 still leaching into the river? All of those are factors that
4 he's going to have to weigh in some sort of qualitative manner
5 to come up with how many PCBs were ultimately released.

6 The one fact there that really doesn't totally rely
7 on his expertise, if you will, is "When did you hook into the
8 city sewer system?" We weren't asked that. We were asked, you
9 know, "What was the amount of PCBs that were discharged?"

10 Every one of the parties here is going to have an
11 expert who is going to opine on that. We have to because we've
12 ultimately got to show what we discharged, because it's a big
13 factor on how much Judge Jonker is going to say we're
14 responsible for. But until they are done doing that, I don't
15 know how I answer interrogatories that say "Tell me what your
16 expert is."

17 And just to be clear, while we'll produce a 30(b)
18 witness, if that's what Mr. Marriott wants, his answers won't
19 be any different. I can't -- the representative of the
20 company, until those experts are done, as I've explained to
21 Mr. Marriott, won't have answers to give any different than
22 answering these interrogatories. So my predicament is the
23 same. I didn't want to suggest that I wouldn't produce
24 somebody, but until I'm done, he doesn't have anything to say.

25 So the experts are trying to take all these factors

1 and opine as to the amount of PCBs that were discharged from
2 every one of these 14 mills. And some of these mills, because
3 none of the parties in this room have any relationship to them,
4 even as a third cousin twice removed, they are really, really
5 hard to try to figure out what it was they discharged. And in
6 those cases the experts have to look at them and say "I've got
7 no operational records, I have no mediation survey
8 questionnaire from the early 2000s, but I think it was this
9 kind of a mill that was making this kind of product, so I
10 assume this is how much PCBs they discharged." It will not be
11 based on a lot of facts. It's going to be based on their
12 expert opinion and their knowledge of the industry and what the
13 processes of a mill of that sort would have had. So in that
14 regard, Judge, we're really, really at a loss to answer those
15 questions.

16 Now, the other category of documents -- I'm sorry --
17 of requests that NCR has made is the third category I
18 mentioned, their involvement with and responsibility for PCBs
19 released at the site. This is really an issue of law, and we
20 answered that interrogatory by saying "We think you're
21 responsible for all of the CCP, because every bit of carbonless
22 copy paper was originally manufactured for NCR. So you're
23 responsible for it all. You provided it directly or
24 indirectly, all of it to the site." We said that in response
25 to their interrogatory number 5.

1 We also said that "You're responsible under CERCLA
2 for all of the CCP and, therefore, all of the PCBs at the
3 site." And we said "That's because Judge Jonker found NCR to
4 be liable in phase 1 of the case." And that's what we said in
5 response to interrogatory number 6.

6 Now, what -- interestingly, what NCR is trying to do,
7 Judge, is what I very unsuccessfully tried to do in front of
8 you a couple of months ago -- and by the way, Judge Jonker
9 agreed with you -- I said, "Look, in phase 1 I had one mill,
10 the Bryant Mill, and now Georgia-Pacific wants to bring a
11 couple other mills in that are located way up in Battle Creek."
12 And we said that ought not come in. And we had a status
13 conference in front of Judge Jonker, and I raised my hand and
14 actually filed a motion in limine in advance of that and said,
15 "Judge, how are these mills in?" And he said, "Look, when
16 you're in and you're liable in phase 1, you know, we'll
17 determine all this later as to what you're responsible and what
18 you're not responsible for.

19 In our view he has found NCR to be responsible as an
20 arranger for CCP in the site. So from our perspective they are
21 responsible. They are in. There's no parsing up of anything.
22 It's all in. And so I think that that was something that we've
23 already been determined. But most importantly, we've given him
24 a response. We have said, "You're responsible for it all and
25 you arranged for it all." They may not like that answer, and

1 they want to read Judge Jonker's opinion differently than we
2 want to read it or than we do read it, but from our perspective
3 that's very much a question of law. So it really comes down to
4 the questions about how much PCBs did each of the mills
5 discharge?

6 *THE COURT:* Did you say that in your response to 5?

7 *MR. PARKER:* We answer at the top of page 14 in the
8 second sentence, "Further, NCR is indirectly responsible for
9 all CCP recycled at the site and the resulting discharge of
10 PCBs." They asked us --

11 *THE COURT:* That's what you're talking about there?

12 *MR. PARKER:* Yes. They asked us in that
13 interrogatory, "Identify any transactions by which NCR provided
14 CCP." We say -- "directly or indirectly." And we say, "You
15 are indirectly responsible for it all." Because it was all
16 made at their request, Judge. It was all made for them. So in
17 our view, it was all -- indirectly at least, if not directly,
18 they are responsible for all of it.

19 You know, Judge, Mr. Marriott mentioned that after we
20 got these interrogatories we served a similar admittedly less
21 onerous set of the same discovery on NCR. I will tell you that
22 was a defensive move on my part. I looked at these and said,
23 "These can't be answered now and they know that."

24 Now they have taken an extension and haven't yet
25 responded to mine. But I did that because I was hoping it

1 would point out that this is premature. This is the subject of
2 our experts. This is what they are going to talk about. And
3 your point that perhaps we should have done fact discovery
4 after expert discovery may resonate a little bit. But the
5 truth of the matter is that right now International Paper is
6 not in a position to answer any of these requests. If they
7 want to give me some specific requests that talk about, you
8 know, "When did you hook into a wastewater treatment plant?" I
9 could answer that. But I can't answer, "How many PCBs did you
10 discharge?" I don't yet know how much CCP did I recycle,
11 because that's going to be an opinion. There are no facts that
12 show that 50 years later. My guys are going to have to surmise
13 what that was by looking back at a whole bunch of factors. The
14 nature of the mill, its capacity, what mills were generally
15 recycling at that time. And, frankly, even you can look -- you
16 know, one of the things, Judge, there's no doubt that all the
17 mills recycled this stuff. To the extent we have these dumps
18 that he shows, these landfills, they are filled with PCBs, so
19 we know we recycled the CCP. But trying to determine how much
20 and when and those sorts of things is going to be something our
21 experts are going to do. You know, the judge has set a
22 deadline for experts. I promise you, Judge, our guys are
23 working hard. They are not done with this. This is a really,
24 really complicated, difficult analysis. And when they are
25 done, we will respond and give NCR these answers. But until

1 then, I'm not sure what I can do other than what I've tried to
2 do right now.

3 *THE COURT:* What about partial answers? Obviously
4 your experts must have some of this information. They are not
5 going to get it all in the last hour and try to put it
6 together.

7 *MR. PARKER:* But here is my problem with that, Judge.
8 In other words, if I say, "Well, my experts are working on this
9 and they think maybe this mill produced this much PCBs were
10 discharged, but we're not done and we're still checking on it,"
11 first, I don't know what use that is to NCR, unless they want
12 to try to hold me to it so they have got some aha moment when
13 my experts are finally done with their reports and they have
14 had a chance to review everything and they come out with those
15 reports and they say, "Okay, the Bryant Mill discharged a half
16 a pound of PCBs" -- I wish it were so -- but say a half a pound
17 of PCBs, and Georgia-Pacific's mill, you know, discharged
18 7 million pounds of PCBs. The numbers are probably wrong. The
19 scale is close. But, you know, if I tell them in the interim,
20 "Well, you know, our mill discharged a pound and
21 Georgia-Pacific's discharged 3 million," when they come out
22 with a half million and 7 million at the end, NCR is going to
23 say, "Aha, we asked you in an interrogatory, and we know your
24 experts weren't done, but this is what they told us, so now you
25 can't tell us something different." That's the problem with

1 trying to give them some answer before our experts are done
2 coming up with this. Because it's not always --

3 *THE COURT:* I wouldn't think that would be a problem
4 if you identify it as a partial answer based on what you have
5 to date with the idea that you will continue to supplement it.

6 *MR. PARKER:* On Friday I called our experts in
7 anticipation of that possible question and said, "Where are you
8 in this process?" And they are still studying the various --
9 with most of the mills, frankly, trying to figure out what kind
10 of processes did they have. Did they have these save-all
11 systems, for example? How effective were their clarifiers?
12 And these like variables are huge in trying to determine how
13 much was your car driven almost in terms of the carbon monoxide
14 emissions. And then they have got to break it down by year, by
15 mill. We are working really, really diligently to get this
16 done. I mean, it is unconscionable the amount of money that
17 the parties in this room are spending with experts in this
18 case. And they are talented people, they are working hard, but
19 trying to hold them to something prematurely I think is unfair
20 to them and it's not particularly useful. Particularly if at
21 the end of the day we get to say, "Well, that's not what --
22 "Upon further reflection here is what they come up with." It
23 would be almost like asking for preliminary expert reports.
24 Which I've not heard a court do, but I'm not sure it would be a
25 good idea either. Because, again, I don't think that until

1 they are done it's fair. Or I don't think they would feel
2 comfortable saying "This is our answer to a reasonable degree
3 of scientific certainty" until they have had a chance to
4 complete their report entirely.

5 As a result, if there are specific factual
6 interrogatories that NCR would like to ask like "When did you
7 hook into the sewer system? When did you put in your clarifier
8 system?"

9 *THE COURT:* I think counsel has made the point, he's
10 looking for contention interrogatories. He's viewing these as
11 contention interrogatories.

12 *MR. PARKER:* Fair. But how can I answer what PCBs I
13 contend were discharged from Georgia-Pacific's mill let's say
14 until my experts have come up with an answer for that? I don't
15 know the answer to that. International Paper doesn't know the
16 answer to that. My guess is if St. Regis were still in
17 existence they wouldn't know the answer to that because they
18 didn't operate the mill. So we've got to look at what records
19 we can, what evidence in the industry exists, what other things
20 that these guys divine from output, input, that they can find
21 and go from there, Judge. So it's really a contention
22 interrogatory that asks "What do you contend your experts are
23 going to say at the end of the day about these facts?" And
24 it's a sad commentary on a CERCLA case like this, I guess,
25 that's 50 years old that that's what we're left with. But the

1 witnesses themselves, were they able to assist in this kind of
2 thing, unfortunately have long since passed away. So we don't
3 have people we can ask. We don't have records that we can look
4 at beyond what have been produced. And that's the predicament
5 I find myself in. I fully understand. I do not like coming in
6 before a judge like you and saying "I can't answer." I know
7 that's not a good defense. But in this case it's actually
8 true.

9 *THE COURT:* Well, we agree on that point.

10 *MR. PARKER:* It's true or it's a good defense?

11 *THE COURT:* We agree on that point it's not a good
12 defense.

13 All right. So tell me when you could have a
14 preliminary expert report done.

15 *MR. PARKER:* I don't know the answer to that question
16 at all.

17 *THE COURT:* Well, it's the middle of September.

18 *MR. PARKER:* I can tell you when the schedule is for
19 when our expert reports are due.

20 *THE COURT:* Yeah, that's November 17th, isn't it?

21 *MR. PARKER:* Um --

22 *THE COURT:* I'm not sure they are all due the same
23 day.

24 *MR. MARRIOTT:* The party bearing the burden on an
25 issue --

1 MR. PARKER: Thank you.

2 MR. MARRIOTT: -- submits a report on November 17th.

3 THE COURT: All right. So that's two months from
4 now. It sounds like anything that breaks this cycle of "none
5 of us can do anything until everything is done" would be of
6 some use. Knowing I'll ask the other side the same thing.

7 MR. PARKER: It sounds then we're like accelerating
8 the schedule that Judge Jonker set. And I appreciate --

9 THE COURT: Well, otherwise we're going to be in a
10 position -- if the Court accepts the argument that nothing can
11 be done until we have the expert reports, then we have no
12 alternative but to have further discovery after you have the
13 expert reports, because that's going to be the first time the
14 other side is exposed to your contentions, and they have an
15 opportunity, it would seem to me, to be able to respond to
16 those contentions.

17 MR. PARKER: Well, we do have expert discovery after
18 the reports are submitted. To the extent our experts rely --

19 THE COURT: How about more factual discovery?

20 MR. PARKER: Actually I don't think so, Judge,
21 because the facts that they do rely on, to the extent there are
22 any, are going to be very static. In other words, they will
23 say, "Here were a couple of documents that I looked at." This
24 is what happened in phase 1. I'll give you an illustration.
25 Georgia-Pacific put on an expert who said, "I could tell in

1 your landfill when the stuff was deposited, so I could tell
2 when it was you were recycling CCP and discharging PCBs." And
3 he said, "Here is some data that I looked at." And he
4 identified in his expert report, you know, this is -- these
5 were reports you could look back. They were basically core
6 samples that had been taken of the landfill.

7 It's not like anybody is going out and talking to
8 witnesses here. They are dead. So you do get to see exactly
9 what documents. Using those documents that he identified in
10 his report, as an expert has to do, I was able to cross-examine
11 him -- or take his deposition, ask him a bunch of questions,
12 and then cross-examine him at trial. And I think the same
13 thing will happen here. Each one of the experts will identify
14 those documents or industry treatises on papermaking or those
15 sorts of things that they rely on in coming up with these.

16 Mr. Marriott will be able to look at those. It's not
17 as though there's other additional discovery that will have to
18 be done about facts. If he thinks, "Well, that's a bad
19 treatise, I've got a better one," it's like any other expert,
20 he'll be able to use that. But there's not more facts to be
21 developed beyond those which the experts identified they relied
22 on. And I suggest those will be precious few. They will be
23 the mediation questionnaires. There may be some documents that
24 say, "Here is when we switch to a sewer -- to the sewer system
25 from direct discharge to the river." But there's not going to

1 be a lot of documents of that nature that anybody needs to go
2 out and do more discovery on. And there's nobody to ask.
3 Unfortunately they have all passed away. So I don't think the
4 predicament would be like you would see in a normal case
5 because our facts are static. They can't -- there's nobody
6 alive to talk, and the documents have to be identified by the
7 expert as they relied upon. And that's exactly what happened
8 in phase 1 with exactly the same sequencing we have here of
9 fact discovery and then expert discovery. So I think from that
10 standpoint we should be okay.

11 *THE COURT:* All right. Thank you.

12 *MR. PARKER:* Thank you, Judge.

13 *THE COURT:* The Court is somewhat sympathetic to the
14 comments that it's hard to go back and ask people 50 years ago
15 what happened. In our own world to save the taxpayer dollar,
16 the Administrative Office which is what we all answer to in
17 Washington, has decided that we can save shelf space at the
18 National Archives by simply destroying the court's files and
19 thereby save a little rent space and presumably balance the
20 budget of the United States government. So to do that they are
21 going to destroy 80 percent of our records from 1970 to 1996, a
22 25-year period. They figure that's an economical way of
23 balancing. But they said if -- of course, some of us have
24 protested that there might be some significant cases during
25 that period of time. And they said, "Well, if there are,

1 that's fine, there may be some historical cases, go back and
2 talk to the judges during that period and get their
3 recollections and so forth." And we said, "Well, eighty --
4 86 percent of the criminal cases were from judges who are no
5 longer with us." So, you know, in one memo I wrote about it I
6 said if you can give us some funding for a séance, we actually
7 could do something. I think that line got stricken before the
8 memo went off to Washington.

9 But anyway, it's an ongoing battle, and so I
10 understand exactly what you're saying.

11 Counsel, go ahead.

12 *MR. SIBLEY:* If I may, Your Honor, Trey Sibley for
13 Georgia-Pacific. This is a motion by NCR against IP. I should
14 probably keep my mouth shut. But the answer to the motion is
15 going to impact my client --

16 *THE COURT:* I understand.

17 *MR. SIBLEY:* -- the same as it will impact
18 International Paper.

19 Your Honor, I think what it would be useful to do is
20 to step back and put into context the factual dispute that has
21 driven the need for this discovery.

22 In phase 1 of the case Judge Jonker found that NCR
23 qualified as an arranger for the disposal of a hazardous waste.
24 The hazardous waste in this case being carbonless copy paper.

25 The judge also found with respect to

1 International Paper that they were an owner of a facility at
2 the time of disposal and Weyerhaeuser had stipulated to
3 liability.

4 Now, as you ruled on International Paper's motion for
5 a protective order, or maybe it was our motion to compel, once
6 you're in the -- once you've been found liable, it's like --
7 it's very much like criminal sentencing. There are a host of
8 factors that come into play, and all of those factors can be
9 considered. One thing that makes this slightly different from
10 criminal sentencing is the idea of apportionment.

11 Judge Jonker found -- and let me explain why that's
12 relevant. Judge Jonker found in phase 1 -- and I think
13 recurring to his opinion is very important here -- he found in
14 phase 1 that NCR during the period of time when it
15 unquestionably was possessed of the state of mind sufficient to
16 make it an arranger supplied a considerable amount of the
17 carbonless copy paper, wastepaper that was recycled by mills in
18 the Kalamazoo River. I don't think any party disputes that the
19 mills -- the vast majority of mills that are at issue here, the
20 vast majority of the 14 mills, recycled at least some
21 carbonless copy paper. By force of Judge Jonker's ruling in
22 phase 1, a considerable amount of that would have come from an
23 NCR source.

24 That's critical because it gets to the question of
25 apportionment of harm. Can we carve at the joint such that --

1 as we believe NCR will attempt to do in phase 2 -- NCR's
2 liability can be capped such that equitable factors could not
3 come into play to make NCR 100 percent responsible, which is
4 our core contention, and is the conclusion that Judge Griesbach
5 reached with respect to the Fox River in Wisconsin.

6 To carve at the joint, to achieve apportionment, NCR
7 must be able to state with precision how much of its paper went
8 to each mill. That's why they are pushing this discovery on
9 each of us to get to us answer the question. The trouble that
10 they have -- and this is -- no amount of discovery will change
11 this fact -- we don't know the answer to that question.

12 We know that there was a considerable amount so
13 Judge Jonker found. We know that it went to multiple mills.
14 There are documents establishing that that have been well
15 discussed and have been produced in phase 1. But there's no
16 document out there, there's no piece of evidence, of testimony
17 that will give the level of precision that NCR is seeking in
18 its interrogatories. And that is the core problem.

19 Mr. Parker is absolutely right when he says that the
20 facts here are static. The documents out there that are
21 available have been in circulation, they have been produced,
22 everyone has them. We know which ones are the key ones. We
23 have identified -- Georgia-Pacific has identified those in our
24 answers to NCR's interrogatories. And International Paper has
25 identified a fair number of those in answer to interrogatories

1 we've propounded to them.

2 Those documents describe relevant operational
3 characteristics that go to the ultimate question "About how
4 much would this mill have done?" And I state that with a sort
5 of lack of precision because no one can go -- no one can do
6 much better than that.

7 We know that this mill was operational from -- you
8 know, was in operation during the relevant period. We know it
9 produced about this much paper. We have some testimony and
10 other evidence that says their mix of furnish would have been
11 roughly this much wastepaper versus this much virgin fiber.
12 And we have some evidence that they recycled carbonless copy
13 paper. That evidence being, as Mr. Parker rightly noted,
14 mostly in the environmental record in these landfills.

15 The key question is how much, how much of NCR's
16 paper. That's the question they want to ask. And the question
17 has really already been answered. That is impossible to state
18 with any certainty. And that's a result, quite frankly, of
19 decisions that NCR made long ago when they disposed of their
20 sales records that would say where all of their wastepaper
21 went. I'm not casting blame, I'm not suggesting spoliation or
22 anything like that. It's just the circumstance we find
23 ourselves in. If we had a complete comprehensive documentary
24 record, perhaps we could achieve that level of certainty.

25 A couple of other points that I think bear emphasis.

1 NCR already knows the parties', the recycling parties' core
2 contentions. They know that we contend that they arranged for
3 disposal of carbonless. They know why we contend that. And
4 they know we've -- at least Georgia-Pacific has taken the
5 position that it is impossible to state with precision exactly
6 how much NCR paper went there versus other paper. And we don't
7 think it matters.

8 Mr. Parker rightly notes that every molecule of
9 Aroclor 1242. That's the -- Aroclor is the trade name. That's
10 the PCB, the type of PCB that was put on this paper. Every
11 molecule of 1242 that's in that river came from one of two
12 places: NCR headquarters in Dayton, Ohio, or its facility in
13 Portage, Wisconsin. That's where it all came from.

14 Judge Jonker found that NCR knew long before anybody
15 else that this Aroclor 1242 was hazardous to the environment.
16 They knew -- it's funny, Your Honor, this document on page 7 of
17 their deck, this cartoon diagram, there's a very similar
18 document like this that was made in 19 I think 68 or 69 where
19 NCR is talking about just this dynamic and how PCBs from its
20 product are necessarily being discharged into rivers in the
21 United States and in the United Kingdom as a result of NCR's
22 actions. It's a critical fact.

23 I emphasize all of this not to lapse into the merits
24 of the case unnecessarily. I think it's very relevant to this
25 dispute that the Court appreciate where this comes up and where

1 this fits in the big scheme of things.

2 Another couple of points I think that bear emphasis.
3 I think we do take some issue with sort of the undifferentiated
4 use of Rule 33(d). We do think there is a modicum of precision
5 that's required identifying at least some specific stuff. In
6 the supplementation that has occurred, NCR very well may
7 have -- or International Paper may have achieved that. I
8 suppose that's a question for another time. But I do think
9 they can't -- we agree with NCR insofar as NCR says you can't
10 just point to the universe of documents and leave it at that.

11 That said, I do think NCR goes too far with its
12 request for a 30(b)(6) deposition. That's also the topic of
13 its motion, and that's lurking out there for the parties. No
14 corporate representative from Georgia-Pacific is going to be
15 able to have any information other than what its lawyers have
16 on what was done at one of these other mills. I'm flipping to
17 the map of the site. There are 14 of them.

18 To the extent we've formed a position on what
19 happened at say the National Gypsum Mill, that's stuff that we
20 would have spoken to already to one degree or another in
21 written discovery. We think a 30(b)(6) on that as to what
22 other people did is a waste of everyone's time.

23 *THE COURT:* But the irony is the other side in this
24 motion hasn't objected. You're objecting because you're seeing
25 the same thing affecting you down the line, but you're not a

1 party to this particular motion.

2 MR. SIBLEY: No, I think International Paper does
3 object to that. Mr. Parker can speak for me if not. You mean
4 on the 30(b)(6). I'm sorry. Yeah.

5 On the question of answering as to what happened at
6 other parties' mills, I do think there's a clear distinction
7 there. I think we can say in general terms we can identify the
8 factors that would make it more or less likely that a given
9 mill would have used carbonless. But there's nobody at
10 International Paper, there's nobody at Georgia-Pacific who can
11 say with the precision that NCR seeks how much carbonless copy
12 paper the National Gypsum Mill would have used in its period of
13 operation and let alone how much of that came from an NCR
14 source.

15 I think the idea, Your Honor -- you discussed the
16 idea of preliminary expert reports. I don't think that's --
17 Georgia-Pacific does not think that that would be a worthwhile
18 approach. The court schedule is set, and November 17th is the
19 date for experts to speak on this. I don't think it is
20 necessarily the case that NCR needs experts to learn what our
21 contentions are. They know what our contentions are. They
22 place a lot of importance on these facts: How much carbonless,
23 how much NCR carbonless did a given mill recycle. We've
24 answered that. We say we don't know. We know it was a
25 considerable amount. That's what Judge Jonker ruled in

1 phase 1. We know if it was a mill of this type, it would have
2 been more likely rather than less to use it. We know that the
3 environmental record shows that the mill used it because
4 there's lots of PCBs, Aroclor 1242, or PCBs characterized as
5 Aroclor 1242 in landfills. And that is enough.

6 You were tagged with the -- I know you didn't like my
7 metaphor the last time -- but the golden ticket. You've got
8 your ticket to the dance. You've been found guilty and it's
9 time for sentencing. And the factors that can be considered
10 are considerable, and we don't think it's terribly relevant
11 precisely how much to get down to the precise level. It can't
12 be done. We said that. And I think -- I think it's useful for
13 the Court to consider that substantive context in deciding
14 exactly what International Paper should be required to do. Of
15 course, that obligation will likely be imposed on
16 Georgia-Pacific as well, so that's why we appreciate you
17 allowing us to speak to this.

18 *THE COURT:* I appreciate your comments. I'm not sure
19 where they leave the Court. It sounds like you're splitting
20 the baby a little bit as far as saying that International Paper
21 ought to do a better job of responding than they did, but they
22 can't live up to what NCR wants them to give.

23 So how much should they be able to produce?

24 *MR. SIBLEY:* Well, I think there are certain
25 documents that are of particular relevance. I mean, the answer

1 that International Paper gave to each one of these questions
2 was, "Look at all the documents. We don't know. Our experts
3 are looking at it."

4 We don't have in front of the Court, but we could,
5 show you what Georgia-Pacific did by way of contrast. We've
6 pointed to -- you know, to deal with the question how much
7 carbonless came from NCR. We point to Judge Jonker's opinion.
8 We point to the evidence that underlies that. We show that
9 here are the bodies of evidence. All of that, by the way, is
10 documented quite extensively in our proposed findings of fact
11 from phase 1. The evidence is out there.

12 I think Mr. Marriott identified what his real issue
13 is. He's like, "Am I going to be surprised by another body of
14 evidence?" If I have some secret set of documents that answer
15 this question or if I have some witness who is going to speak
16 and can tell you exactly how much NCR paper or paper from NCR
17 resources we recycled. If we have that stuff, it's our
18 obligation to disclose it. And if we haven't disclosed it and
19 it appears for the first time in an expert report, they have --
20 they would have a decent motion, I would submit, that that
21 information should not be considered.

22 That's really what they are going for. This is an
23 attempt to box us in to a specific position, and I don't -- I
24 think the evidence is all out there. There's no more documents
25 that are going to be identified. There's no more witnesses

1 that have something to say.

2 *THE COURT:* Well, there's 4 million documents, so I
3 suspect there probably aren't any more documents. But isn't
4 the whole question which of those 4 million are really
5 pertinent to this lawsuit?

6 *MR. SIBLEY:* Well, and I think we've identified those
7 in broad category. The -- we noted that in Georgia-Pacific's
8 answers to the interrogatories. And this is where I
9 think we -- this is where we do -- you're right, we do kind of
10 split the baby. I don't think International Paper --
11 Georgia-Pacific does not think International Paper went far
12 enough. I think you need to do more. We think we did. We
13 think we satisfied that burden. We think that's enough. But
14 the precision that NCR seems to seek is something they
15 desperately want, and they desperately want us to be able to
16 say with precision down to the molecule how much, because they
17 have to. That's a critical part of their defense in this case.
18 And that's just impossible. And that is a fact. No amount of
19 discovery is going to change that. We can identify at a rough
20 high level of generality what the contentions are. We
21 certainly have done that. I think International Paper is
22 moving in that direction. But to achieve the level of
23 precision that Mr. Marriott seems to command is not -- is not
24 -- it's not going to happen. We'll have experts who offer
25 opinions about what all of this -- the factual material might

1 suggest.

2 *THE COURT:* But we don't have any expert so far who
3 has produced an affidavit to support what you're saying?

4 *MR. SIBLEY:* No, we don't have that, but we do have
5 the answers that have been provided. Right? We do have the
6 environmental record.

7 *THE COURT:* We apparently have your answers, not
8 International Paper's.

9 *MR. SIBLEY:* A fair point. A fair point. And we do
10 think that they should go further than that. But I don't think
11 the bar is all that high for International Paper to clear here.
12 I think there's -- and I don't think it's any mystery at all to
13 NCR what those categories of evidence are. They have been well
14 rehearsed. They have been discussed in phase 1.

15 The environment -- the environmental record tells the
16 tale, right? These landfills are chock full of PCBs. And they
17 are PCBs that came from recycling NCR paper. That is -- that
18 is probably the least controversial fact in this entire case.
19 And I don't think -- I just don't think -- I think there's this
20 notion lurking back there that there is some core position that
21 a party has yet to reveal that would be -- would come up in an
22 answer to one of these interrogatories, and I would submit that
23 that's just not the case.

24 *THE COURT:* Okay.

25 *MR. SIBLEY:* Thank you, Your Honor.

1 *THE COURT:* Thank you.

2 *MR. BAIRD:* Actually, may I?

3 *THE COURT:* Certainly.

4 *MR. BAIRD:* Your Honor, Chris Baird for Weyerhaeuser.

5 I just wanted to make a couple points in response to your
6 question about whether preliminary expert reports could be
7 useful here. And Weyerhaeuser's position is that they
8 wouldn't, and I've got at least three reasons for that.

9 One is a schedule reason. You know, we've been
10 living with this schedule for quite some time. There was an
11 extension just a few weeks ago. But the schedule provides for
12 two expert disclosure dates. There's a primary -- the party
13 with the burden on an issue has to submit its expert reports by
14 the middle of November. The party that doesn't have the burden
15 gets to submit responsive expert reports I think it's the
16 middle of January. So to do preliminary expert reports before
17 the close of fact discovery wouldn't preserve the option for
18 parties without the burden to get -- to have the time that they
19 are going to need to respond to the expert reports because we
20 only have seven weeks left here. So there's some issues that
21 Georgia-Pacific as the plaintiff it will have the burden on.
22 Weyerhaeuser as the defendant, it will be responding to
23 Georgia-Pacific's experts.

24 Now, as a defendant I'm completely fine with that,
25 which leads to the second issue. All of the experts will list

1 in their reports the documents that they reviewed and the
2 documents that they relied upon. I'll be able to depose
3 Georgia-Pacific experts. I'll be able to say, "Hey, my expert
4 says that this document is important. Why didn't you find that
5 important?" That's completely fine. I have two months to
6 depose GP's experts, and then actually the expert discovery
7 cutoff is another six weeks or so after rebuttable expert
8 reports are due. That's plenty of time for there to be
9 depositions about why parties did or did not find certain parts
10 of the record to be persuasive.

11 The only other point I'll offer is that until we
12 identify our experts in the course of expert disclosures, all
13 of our experts right now are consulting experts. The opinions
14 or views of consulting experts are not the subject of discovery
15 until they are offered as an expert. You know, I don't --

16 *THE COURT:* Experts have not been identified yet?

17 *MR. BAIRD:* No, they have not been identified yet.
18 Not to each other. We presumably each have a stable of experts
19 that we've been working with. Some of them we might be quite
20 confident will testify; others may not, depending on the views
21 that they come out with. And no party is entitled to the views
22 of another party's consulting expert.

23 *THE COURT:* Huh.

24 *MR. BAIRD:* And unless you have any questions, that's
25 all I have.

1 *THE COURT:* I appreciate your comments, Counsel.
2 Thank you.

3 *MR. BAIRD:* Thank you.

4 *THE COURT:* I didn't realize you had not identified
5 experts yet.

6 Counsel --

7 *MR. MARRIOTT:* Thank you, Your Honor.

8 *THE COURT:* -- do you agree with Georgia-Pacific that
9 International Paper ought to provide answers that were as good
10 as theirs?

11 *MR. MARRIOTT:* That's a difficult question to answer,
12 Your Honor. They should provide better answers. The
13 Georgia-Pacific answers weren't remotely close. So I know they
14 believe their answers are the standard. I respectfully think
15 they are not the standard. And I -- so, no, I don't think
16 having answers to do what Georgia-Pacific's answers do would
17 get us where we need to get.

18 What I heard, Your Honor, in counsels' comments are a
19 couple of things that I think are particularly telling. What I
20 heard is from International Paper and Georgia-Pacific that all
21 the facts that matter are static. I heard that everybody knows
22 what the contentions are, and I heard there's no mystery here
23 about precisely what those contentions will be. Well, I
24 suppose in some metaphysical sense, Your Honor, all the facts
25 are static because the fact is what it is. But that really

1 isn't the relevant point. The question is which facts matter.
2 And there are, as you recognize now, 4 million pages of paper.
3 There are any number of contentions any one of these parties
4 could make about what goes on at a particular mill. And so,
5 sure, the facts are what they are. The issue is: What are the
6 facts -- what are the contentions they are going to make about
7 them? So we know which facts to marshal, which facts to try to
8 discover in order to make out our defenses. And so the mere
9 fact that facts in some sense are static is really beside the
10 point. The question is: Which ones matter? Which ones can
11 we, should we, do we need to go find in order to make out our
12 defense?

13 We do not know what their contentions are, and any
14 suggestion by counsel to the contrary is simply not true. Yes,
15 Your Honor, we understand they are saying we're completely
16 100 percent responsible. I get that. I've heard them say
17 that. That's not the same thing as knowing on what basis do
18 you contend that that's the case?

19 Contrary to what's been suggested, Judge Jonker
20 didn't say that. Judge Jonker said that we are a potentially
21 responsible party. He found that some amount of carbonless
22 copy paper from NCR made it to the site. He didn't say exactly
23 where it came from. He didn't say which mills it related to.
24 And what's been suggested by counsel is because we are somehow
25 in for a -- in in the sense that we could potentially be

1 responsible for everything that we somehow lose our defenses.

2 What we have is a matter of statute and common law
3 right and opportunity here to try to convince Judge Jonker that
4 there's an apportionment defense, an allocation defense. But,
5 yeah, maybe -- yes, perhaps the Court finds that NCR knew
6 before other parties knew that there were PCBs in its
7 carbonless copy paper, but does that translate into a hundred
8 percent responsibility for the cleanup of the site? We
9 respectfully submit in no way, shape, or form.

10 Obviously my colleagues here take a different view.
11 They are entitled to assert that view, Your Honor, but they are
12 not entitled, we would submit, to deny us any and all discovery
13 to try to -- that matters to try to demonstrate that in fact
14 you can, as counsel says, break this river at the hinges. And
15 you can say in that particular portion of the river NCR has no
16 responsibility. In that particular portion it has no
17 responsibility. In this portion it has a little bit of
18 responsibility.

19 And they have an enormous incentive on their side to
20 not know and to not say until discovery is closed and we can do
21 nothing about it. Because the precision allows us to be able
22 to say -- knowing their contentions allows us to be able to say
23 that the Court can apportion the harm and it can hold this
24 party responsible for that piece and this party responsible for
25 that piece. And the more it's all jumbled together and the

1 more we don't know what the allegations are and what each mill
2 did until a point in time when no one can do anything about it,
3 the more difficult it is for us to be able to make out the
4 defense.

5 But the defense unquestionably exists, and the only
6 way we can pursue it is if we know what their allegations are.
7 Otherwise we don't know which part of the 4 million pages of
8 paper to look at. We don't know which facts to pursue from
9 regulatory agencies. Maybe all the individuals aren't alive,
10 Your Honor, anymore. That I'm sure is true. I know that to be
11 true. That doesn't mean that agencies and individuals don't
12 have knowledge that might relate. And knowing what the
13 allegations are makes it possible to know exactly what it is
14 that relates.

15 So it's been suggested that somehow the experts just
16 don't know and we can't know. What we seek is not their
17 experts' opinions. We are not trying to get their experts'
18 opinions. We want the company's position. And the company is
19 free to determine that position however it wants. It can look
20 in a crystal ball, it can hire an expert. The lawyers can sit
21 around the table and make it up. We don't much care. We just
22 want to know what their position is and what the basis of it is
23 so that we can defend ourselves at trial and we can put on a
24 case that tries to convince the judge that we don't, contrary
25 to what they are all saying, bear a hundred percent

1 responsibility for what happened at this river.

2 *THE COURT:* What is your answer to their position
3 that like you they came into this case long after it was over,
4 long after the facts were whatever they were, and they don't
5 know any more about them than you do. In fact, the argument
6 was may know even less than you do. But let's assume they
7 don't know any more than you do. So the argument has been
8 persuasively made that they really need their experts to go
9 back through these documents, try to figure out what happened,
10 what was the course of business back in the day, and so based
11 on whatever they are able to put together and put together with
12 whatever the course of action was back in the day, they can
13 make reasonably sound estimates as experts that probably this
14 much CCP was being used in this plant or that plant and so
15 forth. So it's a best-estimate sort of thing, I suppose. But
16 they won't know that until their experts get done doing this.
17 Their experts are overworked as it is. And so they will have
18 this done by the November -- November 17th, but probably not
19 much before that. And that's when they will know -- be in some
20 kind of position to answer your question.

21 *MR. MARRIOTT:* Well, Your Honor --

22 *THE COURT:* Before that what you get is going to be
23 worthless.

24 *MR. MARRIOTT:* Sure. Well, with respect to that
25 question, we are in some sense in a similar position to

1 International Paper. We didn't have a mill at the site. We
2 didn't discharge anything into the site. And so we have to for
3 ourselves answer the very same questions.

4 We didn't ask these questions not expecting that we
5 weren't going to get the same questions back to us. In fact,
6 we got at least one of them from International Paper. And
7 though it hasn't been mentioned and though our 30(b)(6) notice
8 has been called overbroad, we got a 30(b)(6) request that was
9 twice as broad from Georgia-Pacific asking us essentially the
10 same question. So I fully get that I can't stand here and ask
11 you to order them to do it without expecting that I'm going to
12 have to do the same thing. And I think that's just a sensible
13 way to do it. So will we get the input of our experts in doing
14 this? We will. Will we have the lawyers sit around and think
15 about what makes sense in various -- given all the allegations
16 in the case? We will. But at least at some point in time the
17 parties will then exchange positions so we can actually in some
18 sensible way figure out whether there's any fact discovery that
19 matters and should be pursued in relation to it.

20 So is it challenging? It is challenging. I don't
21 deny that it's challenging. But the case wasn't filed
22 yesterday, right? The case was filed in 2010. There was an
23 entire first phase. There was a first-phase trial. There was
24 a decision by Judge Jonker a year ago. And over
25 Georgia-Pacific's objection, over their objection Judge Jonker

1 extended the fact discovery period past September 15th.
2 Georgia-Pacific objected. They wanted their expert reports to
3 go in sooner, not later. They wanted fact discovery to be
4 over. They don't want us to be able to get at the underlying
5 facts that will demonstrate that this harm can in fact be
6 apportioned and it can in fact be allocated.

7 So, yes, we require experts, yes, they are working
8 hard, but at some point in time, Your Honor, you have to be
9 able to identify what your position is if we're to meaningfully
10 move forward. They have known that their expert reports -- all
11 parties have known that expert reports were going to be due
12 this fall. Until just a couple of weeks ago they were due much
13 sooner than they are now due in November. People have been
14 working -- should have been working under the expectation that
15 they would have to disclose their positions. We held these
16 requests until later, expecting that if we did it too soon
17 knowing people would say it's too soon. Now we're both going
18 to be too soon and too late all at the same time. So the
19 parties have had enough time to figure it out.

20 As far as producing preliminary reports, Your Honor,
21 I, frankly, don't disagree with all counsel that the production
22 of a preliminary report is probably not the best solution here,
23 but what we're asking for demands and requests far less than a
24 complete report.

25 Just, for example, if you look at the first of our

1 requests, "Please identify by year and mill the amount of
2 carbonless copy paper recycled at the site during the period."

3 Rather than give us a complete report with all of the
4 T's crossed and all of the I's dotted about that, it ought
5 not --

6 *THE COURT:* Are you looking at interrogatory 1?

7 *MR. MARRIOTT:* I am, Your Honor. It ought not be
8 that difficult of a proposition to say, right, Based upon our
9 analysis of the records provided, our position in the case is
10 that "X" mill recycled carbonless copy paper as follows. In
11 1954 approximately X pounds a year. And in each of the
12 following years the same amount except in 1967 approximately
13 20 percent more. I mean, that's a bottom-line position.

14 If their experts are truly going to be in a position
15 to submit expert reports on November 17th, which is an
16 extension of what the deadline was until recently, they
17 certainly know the essence of what it is they are going to say
18 if they are in a position to now be preparing all of the backup
19 that goes with it. So that's a far-less-burdensome exercise
20 than giving us a full report. Just tell us what your position
21 is, tell us what your position is as to how much carbonless
22 copy paper was recycled at each of these 14 mills. And
23 especially for parties like Georgia-Pacific which actually
24 owned or was responsible for some significant number of the
25 mills at the site. It's a much easier exercise for them,

1 Your Honor. They have been involved in litigation at this site
2 for decades. Litigation to which neither IP or NCR had any
3 involvement. So simply answering the question as to what your
4 position is without all that comes with a complete expert
5 report ought to not be that onerous of an exercise, and it
6 at least puts us all in a position to have some sense of where
7 the allegations are before we go into a phase we never again
8 will be allowed fact discovery absence presumably some
9 extraordinary showing that one may or may not be able to make.

10 The mere fact that the facts in a sense are static
11 doesn't mean we have what we need. And the facts, as we all
12 know well, flow from what the allegations are. The ones that
13 really matter. And so I get that we're generally, they say,
14 responsible for everything. That doesn't really tell me what
15 they are arguing. And I'm pretty sure when it comes to trial
16 they are not going to be saying "NCR is responsible for
17 everything, Judge. That's the end of our presentation." We're
18 going to have all kinds of detail that I don't know about
19 today. Thank you, Your Honor.

20 *THE COURT:* All right. Thank you.

21 Well, is your cocounsel the only person that has to
22 argue in front of Judge Jonker, or do other people want to hear
23 his argument and respond?

24 *MR. PARKER:* No, it's not related to this case,
25 Judge.

1 *THE COURT:* Other case.

2 *MR. PARKER:* Yes.

3 *THE COURT:* I didn't want the rest of you to miss out
4 on argument that you might have to respond to, so if you all
5 wanted to hurry up and hear his argument, go ahead.

6 *MR. PARKER:* I wish we could do that.

7 *THE COURT:* Well, I'll try to get you out of here
8 very quickly so that you can go do that.

9 Well, this case certainly is an unusual case in that
10 you're looking back into history that occurred long before any
11 of you were involved. In fact, probably before some of you
12 might have been born. Surprisingly, that doesn't mean there
13 are not witnesses available to some of this, I suspect. But
14 they are probably getting old. There are still witnesses to
15 World War II. But, again, not as many as there used to be. So
16 there are people with memories, there are people that span that
17 time period. But admittedly, it's hard to know what took place
18 at these mills that long ago. And clearly a lot of it has to
19 do or will be determined by what the experts tell you I
20 suspect.

21 Having said all of that, the immediate issue before
22 the Court is the motion to compel the answers to the
23 interrogatories. There's also a request for a 30(b)(6)
24 deposition which I do not understand to be disputed at this
25 point.

1 Now, at the risk of simplifying this too much, dummy
2 it down even more so than the brief that was handed up, the
3 defense seems to be, "Well, until the experts get done telling
4 us what's there and analyzing it for us, we're really not in a
5 position to know or be able to give answers to the
6 interrogatories, because they are going to go through these
7 records, find what they can, and using their expertise draw out
8 from these records the best answers possible." And
9 parenthetically, I really did appreciate this exhibit. I
10 wasn't criticizing it.

11 This motion is really not about the business records
12 or the business records rule. Interestingly, the comment was
13 made, "Well, if they are not records of International Paper,
14 they shouldn't be citing the business records rule." But I
15 guess the records do belong to them, and I'm not too concerned
16 with that argument. But this is really not about the business
17 records. The question is should they respond -- should
18 International Paper respond to the interrogatories? It is
19 International Paper that has cited these records as the source
20 of their answer in saying "Here's your answer. Look there."

21 I don't think it was NCR that was saying where do you
22 find in these records such and such information or produce such
23 and such documents, produce such and such business records.
24 NCR simply wants certain information produced, and
25 International Paper has said, "Well, we don't know it, but it's

1 probably in these records someplace. We can't find it. You
2 can find it as well as we can. And until we talk to our
3 experts, we're not going to know the answers."

4 I think they have a strong point, but I think at the
5 end of the day NCR prevails, because at the end of the day they
6 are entitled to know the contentions of the opposing parties.
7 And they are entitled to know that before the close of
8 discovery.

9 Yes, the facts are fixed. There is a world of --
10 universe of facts. It's not changing. But if it's 4 million
11 pages of facts, it is, as counsel said, the facts that matter
12 that are at issue here. And not all 4 million pages are at
13 issue and not all 4 million pages matter. Which of those pages
14 matter is more to the point. And what are the respective
15 positions of the parties? What is it that NCR has to defend
16 against?

17 That's why I asked is there some bright-line rule
18 that says NCR is responsible simply because they produced this
19 paper? And I didn't hear anybody say that Judge Jonker had
20 ruled that simply because they had produced this paper they
21 are, therefore, responsible for everything. That there was
22 some strict liability.

23 Now, the comment was made that at some point they may
24 have become aware that this paper had PCBs in it and may be
25 some liability attached -- to a greater extent either attached

1 or attached to it at a greater extent after that point. But I
2 didn't hear anybody tell me there was strict liability even
3 after that point. So I don't think it's enough to simply say
4 NCR made this paper, they produced PCBs, PCBs were found at the
5 site and, therefore, NCR is responsible for everything. And if
6 that's not the case, then there's going to have to be some
7 apportionment. And then we get into the contentions as to
8 which mills produced what amount of paper or what amount of
9 PCBs at what times and when. And what amounts, pardon me. And
10 so it seems to me NCR is entitled to know what the other
11 parties are going to be contending so they know what they have
12 to defend against. And it seems to me they are entitled to
13 know that prior to the close of discovery.

14 And I think the parties are probably correct when
15 they say it wouldn't be particularly advantageous to get a
16 preliminary report from the experts. I say that because that
17 would just generate more work by the experts. That's one of
18 those things that you run it up the flagpole and see if anybody
19 salutes it. But that doesn't mean you can't talk to your
20 experts and get enough information to answer these
21 interrogatories. And that's certainly a lot easier than
22 producing a preliminary expert report.

23 The point has been made that the experts are probably
24 fairly well along. They were supposed to have had their
25 reports done sooner than November 19th. The time has been

1 extended. So I have to assume that given another 14 days they
2 ought to be able to be far enough along that they can assist to
3 the extent necessary in providing some answers to these
4 interrogatories so that NCR knows where it stands. And to the
5 extent the other parties are in the same position, their
6 experts can do the same.

7 There's a continuing duty to supplement any
8 discovery, and so to the extent that the experts can provide
9 further information as their reports are finalized and the
10 parties want to adjust their contentions or their answers to
11 the interrogatories, I suppose they have the right to do that.
12 Nor does this require anybody to reveal who their experts are.
13 I'm glad Weyerhaeuser made that point, that the experts have
14 not been identified, that they are simply consulting experts at
15 this point. You are not required to identify where these
16 answers come from or what you're drawing upon when you identify
17 the amount of CCPs recycled and so forth. So that's another
18 reason why it's probably advantageous simply to answer the
19 question and not prepare a preliminary expert's report.

20 So I'm going to grant the motion, require that these
21 responses to interrogatories be supplemented within 14 days of
22 today's date.

23 *MR. PARKER:* Judge, could I raise an issue?

24 *THE COURT:* Of course.

25 *MR. PARKER:* Back when the original discovery cutoff

1 was set in this case it was going to be last Friday, and as a
2 result -- and this is Parker -- I set my vacation for Thursday
3 of this week, and I come back on October 6th. I'll be out of
4 the country with her. That's two weeks.

5 Now, I know there's a couple other lawyers on my
6 team, but none of them have sat and listened to what you've had
7 to say about this. So if I can get another week beyond that --

8 *THE COURT:* You can share what I've said with the
9 gentleman that's up in Judge Jonker's courtroom right now.

10 *MR. PARKER:* Yeah, but he's not -- in fairness, he's
11 been working on the case -- or been present, but he's not been
12 working on the case. So if I can get one more week. I mean,
13 I'm going to literally be unable to talk to these experts. I'm
14 going to be in Spain. So I won't be able to talk to --

15 *THE COURT:* Where are you going to be in Spain?

16 *MR. PARKER:* We're going to Sevilla, Toledo, and
17 Madrid. And I'm really looking forward to it. I would prefer
18 not to have to work on this while I'm there.

19 But if I could get that extra week, that would -- not
20 only would I be happy; Mrs. Parker would be happy. In my many,
21 many years of marriage to her, I've come to learn that she's
22 never unhappy alone. So I would appreciate an extra week, if I
23 could get that.

24 *THE COURT:* If momma is unhappy, ain't nobody happy.

25 I'm not going to put you on the spot by asking if you

1 want to be nice or not.

2 MR. MARRIOTT: I'm not going to make Mrs. Parker
3 unhappy, Your Honor.

4 THE COURT: Thank you very much.

5 MR. PARKER: Thank you.

6 THE COURT: I think Ms. Parker is a very reasonable
7 person. The one thing the Court may consider granting
8 extensions for is preplanned vacations. I suspect it's
9 preplanned by now?

10 MR. PARKER: Yes.

11 THE COURT: All right. One more week.

12 MR. PARKER: Thank you.

13 THE COURT: All right. I was going to suggest you
14 might want to go to Barcelona before it becomes not a part of
15 Spain.

16 MR. SIBLEY: He better act quick.

17 THE COURT: You better act quickly.

18 All right. Thank you.

19 MR. PARKER: Thank you, Your Honor.

20 THE CLERK: All rise. Court is adjourned.

21 *(Proceeding concluded at 4:12 p.m.)*

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1 CERTIFICATE

2 I certify that the foregoing is a transcript from the
3 Liberty Court Recording System digital recording of the
4 proceedings in the above-entitled matter, transcribed to the
5 best of my ability.

6
7 September 25, 2014

8
9 /s/ Glenda Trexler
10 Glenda Trexler, CSR, RPR, CRR
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